European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China: Recourse to Article 21.5 of the DSU by China

(DS397)

Third Party Statement of the

United States of America

November 12, 2014

Mr. Chairman, members of the Panel:

1. The United States appreciates the opportunity to provide our views as a third party in this dispute. The U.S. third-party submission addressed most of the issues in this dispute. In our statement today, the United States will express views on two additional issues – specifically, China's position that the European Union (EU) acted inconsistently with Article 2.4.2 of the AD Agreement for failing to take into account *all* export transactions in its dumping calculation, and China's claim that the EU acted inconsistently with Article 2.4 of the AD Agreement by failing to account for certain alleged differences between production in India, such as differences resulting from the easier access to raw materials, in its dumping calculation.

2. In its submissions, the EU has explained (and China does not appear to dispute) that the EU Commission grouped the fasteners under investigation into model types under the weighted average-to-weighted average comparison approach permitted by Article 2.4.2. That is, for every fastener model exported by Chinese producers, the EU Commission purportedly attempted to identify a matching fastener model produced by the Indian analogue producer, Pooja Forge.

3. In some cases, however, the EU states that it was unable to identify a matching product on the normal value side – namely, where Pooja Forge did not produce a model type exported by Chinese producers. In such cases, the EU commission excluded the "non-matched" Chinese export transactions for purposes of the dumping margin determination.

4. China appears to argue that the exclusion of one or more export transactions automatically amounts to a breach of Article 2.4.2, because the weighted average-to-weighted average comparisons failed to take into account *all* export transactions. The EU responds that these exclusions were consistent with the requirements of Article 2.4.2, as there were no "comparable" transactions on the normal value side.

5. As we will discuss in our statement today, the United States does not agree with China that an administering authority breaches Article 2.4.2 unless each and every export transaction is included in a weighted average to weighted average comparison methodology. This view is too extreme, and does not reflect the text of the agreement or the realities of the administration of anti-dumping measures. On the other hand, the other extreme – such as basing a dumping margin on just one export transaction out of a thousand total export transactions – would also not be appropriate. As the United States will describe, the text of the agreement does provide guidance on instances where certain export transactions might be excluded from a margin calculation.

6. Turning first to Article 2.4.2, the text provides that "margins of dumping…shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all *comparable* export transactions…." Notably, the text limits the comparison to "comparable" export transactions, which clearly indicates that this requirement does not extend to "all" export transactions. Indeed, if WTO Members had intended for the requirement to extend to "all transactions", they would have not limited Article 2.4.2 by including the modifier "comparable" before the term "export transactions."

7. The Appellate Body has also interpreted the text of Article 2.4.2 in this manner. In particular, the Appellate Body has recognized that this provision allows investigating authorities to use "multiple averaging" under the weighted average-to-weighted average comparison methodology.[1] Under this approach, an investigating authority can divide transactions into groups according to model or product type.

8. The Appellate Body has further stated that the phrase "all comparable export transactions," within the meaning of Article 2.4.2, implies that two requirements must be met when investigating authorities calculate dumping margins by grouping transactions and averaging them: (1) they must include in each group only those export transactions that are "comparable"; (2) they must include "all" comparable export transactions corresponding to that group, and none of these export transactions may be left out arbitrarily.[2]

9. Put simply, the text of Article 2.4.2 itself, and past Appellate Body interpretations of this text, do not support China's argument that Article 2.4.2 requires an investigating authority to include *all* export transactions in its calculation of dumping margin. Rather, while the requirement explicitly extends to all ***comparable*** transactions, it does not extend to ***all*** transactions.

[1] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 81.
[2] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 91.

10. If, as discussed, Article 2.4.2 does not prohibit the exclusion of certain export transactions from the calculation of a dumping margin, does this mean that an authority could limit its examination to, for example, only a single export transaction out of thousands of transactions? As noted, this position is also too extreme.

11. The basic definition of dumping is set out in Article 2.1 of the AD Agreement, and Article 2.2 sets out the basic rules covering the situation where a "proper comparison" cannot be made between export price and the price of the like product in the domestic market. Further, Article 6.10 provides important context, and indicates a number of factors which may be relevant when certain export transactions are excluded. To recall, Article 6.10 provides "where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable" the investigating authority "may limit [its] examination… to a reasonable number of….products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country which can reasonably be investigated."[3] From this language, at least the following factors may be relevant in examining a situation where certain export transactions are excluded.

12. First, the number of different types of products is relevant; a large number of different types may support a limitation of the examination.

[3] Emphasis added.

13. Second, the difficulties involved in conducting an investigation of each and every product type are a relevant factor. The text notes that one consideration is whether an examination of each export sale is "impracticable." And at the end of this second sentence of Article 6.10, the language repeats this theme, noting that the limitation of an examination may be tied to what "can reasonably be investigated."

14. Third, where the examination is so limited, the authority must still examine a "reasonable" number.

15. Fourth, the text indicates that what is a "reasonable" number may depend on whether the examined transactions represent a statistically valid sample.

16. Fifth, the text also indicates that the percentage of the total volume of exports investigated is relevant, and is tied to what can "reasonably" be investigated.

17. Sixth, Article 6.10.1 states that is "preferable" for any selection of product types to be made "in consultation with, and the consent of," the exporters, producers or importers concerned.

18. The United States suggests that the Panel apply these types of factors in examining China's claim with respect to the EU's exclusion of certain export sales. Because this involves a close examination of the facts and circumstances of the dispute, the United States takes no position on the ultimate question of whether China has made out its claim with respect to the exclusion of certain sales. Nonetheless, the United States does note its agreement with the EU

that in the circumstances of this case, one particularly important factual circumstance is that China is a nonmarket economy. As a result, the EU was not able to rely on prices charged in China's domestic market, and was required to employ information from an analogue country. The use of this type of methodology appears to have made it more difficult for the EU to examine all product types.

19. Lastly, we would like to address China's claim that the EU acted inconsistently with Article 2.4 of the AD Agreement in failing to make adjustments for alleged differences relating to the production of fasteners in China and the production of fasteners in India, which was the analogue country used by the EU.

20. As an initial matter, the United States notes that the issue raised by China is not governed by Article 2.4. By its plain terms, Article 2.4 sets forth the obligation of an investigating authority to make a "fair comparison" between **the export price and the normal value**. In the investigation at issue, the export price of course is the price to the EU, and the basis of normal value – under the EU's analogue country methodology – were domestic sales in India by an Indian producer. Here, China's complaint is **not** with respect to physical differences, or differences in terms of sale, between the sales to the EU and the domestic sales in India. Rather, China raises a completely different issue, regarding – in essence – whether the domestic sales in the analogue country were an appropriate basis of normal value.

21. Furthermore, Article 2.4 provides that "[d]ue allowance shall be made in each case, on its merits, for differences which affect **price comparability**, including differences in conditions and

terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability." But here, China is alleging difference in production costs between China and the analogue country (India); such alleged cost differences do not themselves affect "price comparability" between sales of two sets of products. Rather, these alleged differences go to the issue of whether or not the Indian domestic sales are an appropriate surrogate for normal value.

22. Turning to the merits of China's factual assertions, we agree with the EU that an investigating authority may determine that normal value cannot be based on sales in a nonmarket economy because of, *inter alia*, a distorted market for raw materials, and that making adjustments to the dumping calculation based on such distortions would be inappropriate. Accordingly, China's argument is fundamentally circular.

23. China argues that India is not an appropriate analogue country because of alleged differences – as compared to China – in costs of raw materials and electricity. However, China fails to acknowledge that the very reason the EU has resorted to India as an analogue country is that the costs in China are distorted because China is a nonmarket economy. Accordingly, any calculation of the "true" costs in China – that is, the costs that would have been incurred if China were a market economy – are not knowable. Thus, in the facts of this dispute, it appears that China cannot establish that costs in China would be lower – or for that matter higher – than the costs incurred by the Indian producer.

24. In short, China's argument, if accepted, would defeat the underlying purpose of not relying on cost and sales data from a nonmarket economy.

25. This concludes our third party statement. The United States thanks the Panel for its consideration of our views.